

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 7, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP1404**

**Cir. Ct. No. 2007CF5436**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAMES J. KILIAN,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
DAVID L. BOROWSKI, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. James J. Kilian, *pro se*, appeals an order denying his motion for postconviction relief. He argues: (1) that he is entitled to resentencing because the circuit court treated a sexual assault charge that had been dismissed like a read-in; (2) that his due process rights were violated because the

sentencing court considered the dismissed charge, and therefore sentenced him on the basis of inaccurate information; (3) that the prosecutor breached the plea agreement by discussing at sentencing the victim of the dismissed charge; (4) that he received ineffective assistance of trial counsel because his attorney did not object to these errors at sentencing; (5) that he received ineffective assistance of postconviction counsel because his postconviction attorney did not raise these issues during Kilian's direct appeal; and (6) that the circuit court sentenced him on the basis of inaccurate information because it believed that his future *presumptive* mandatory release date was a mandatory release date. We affirm.

¶2 Kilian was convicted of two counts of first-degree sexual assault in 2008. The prosecutor dismissed a third count of first-degree sexual assault pursuant to a plea agreement. Kilian was sentenced to twenty-six years of imprisonment on each count, to be served concurrently. His appointed counsel filed a postconviction motion and an appeal to this court. We affirmed his conviction. Kilian then filed this postconviction motion pursuant to WIS. STAT. § 974.06 (2011-12),<sup>1</sup> which the circuit court denied without a hearing.

¶3 Although Kilian raises six legal claims, the first five claims are all premised on one event—during his sentencing, the prosecutor discussed the dismissed sexual assault charge and the circuit court considered it in framing its sentence. It is well established, however, that a circuit court may consider prior conduct by a defendant at sentencing, even when criminal charges related to that conduct have been dismissed. *See State v. Speer*, 176 Wis. 2d 1101, 1131, 501

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

N.W.2d 429 (1993) (trial courts may consider uncharged and unproven offenses in assessing a defendant's character). Moreover, the prosecutor in this case *explicitly stated* at the plea hearing that she intended to emphasize at sentencing the conduct pertaining to the dismissed charge at sentencing and the circuit court *explicitly informed* Kilian that it could consider the conduct pertaining to the dismissed charge, a fact that Kilian acknowledged that he understood during the plea hearing. As for Kilian's assertion that the prosecutor breached the plea agreement, according to the plea agreement as stated at the plea hearing, the prosecutor never agreed to refrain from discussing the dismissed charge as part of the plea agreement, and there is no legal reason that the prosecutor would be prohibited from discussing the factual circumstances underlying the plea as relevant to Kilian's character. Because the circuit court did not err in considering the conduct, and the prosecutor did not breach the plea agreement in discussing it, Kilian's claims of ineffective assistance of counsel premised on these alleged errors are unavailing.

¶4 Turning to Kilian's assertion that the circuit court sentenced him on the basis of inaccurate information because it believed that his future *presumptive* mandatory release date was a date on which he would definitely be released, the circuit court's sentencing comments show that it did not misunderstand the difference between a mandatory release date and a presumptive mandatory release date. In its oral decision, the circuit court explained that it was not going to place weight on when and whether Kilian would be released by the parole board because it did not know what the parole board would do in the future, and thus had no control over that aspect of Kilian's sentence. The circuit court did not say anything that suggests that it did not understand the difference between a mandatory release date and a presumptive mandatory release date. Therefore, we

reject Kilian's argument that he is entitled to redress because the circuit court sentenced him on the basis of inaccurate information.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

